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Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Leadership Conference on Civil Rights (LCCR) is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council—LCCR is the nation's oldest, largest, and most diverse civil and human rights coalition. Its member organizations represent men and women of all races and ethnicities.[2]

Among LCCR's members are organizations, including, *inter alia*, the American Civil Liberties Union, AFL-CIO, Anti-Defamation League, Asian American Justice Center, Lawyers' Committee for Civil Rights Under Law, Legal Momentum, Mexican American Legal Defense and Educational Fund, NAACP, NAACP Legal Defense and Educational Fund, Inc., National Partnership for Women & Families, National Women's Law Center, and Women Employed, that have been at the forefront of advocacy before the courts to ensure equal

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

[2] The appendix to this brief contains a complete list of LCCR member organizations.

employment opportunity for men and women from diverse communities, and to secure essential protections against workplace discrimination.

LCCR promotes effective civil rights legislation and policy as well as the strong enforcement of existing statutory and constitutional protections. Its members are dedicated to preserving the interests of individuals in raising issues of unlawful discrimination and the interest of society in having those issues brought to light. It is extremely important to LCCR that those who protest discrimination, in all of its forms, be protected against retaliation. LCCR has consistently been involved in efforts to secure these protections before Congress and in the Courts. Most recently, LCCR filed amicus briefs on this issue in *Jackson v. Birmingham Board of Education*, and *CBOCS West, Inc. v. Humphries*.

The Leadership Conference on Civil Rights Education Fund (LCCREF) is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice.

LCCR and LCCREF strongly support Petitioner's position that Title VII's anti-retaliation provision affords protection from retaliation for employees who participate in internal investigations. Based on their long experience in supporting and monitoring the enforcement of federal antidiscrimination mandates, amici strongly believes that protection against retaliation for employees who participate in internal investigations is

indispensable to the efficient, effective enforcement of Title VII and of federal anti-discrimination laws generally.

SUMMARY OF ARGUMENT

This case presents a straightforward question: Can an employee be fired for reporting workplace discrimination to her employer during an internal investigation? The answer is no. An employee's involvement in an internal investigation is protected under the plain language of Title VII of the Civil Rights Act of 1964.

It is well-accepted by the Court that Congress intended Title VII to function as a preventive measure, giving employers incentives to help detect and eradicate discriminatory behavior. The cooperation of victims and witnesses of discrimination is crucial to the effective enforcement of Title VII. Thus, Title VII's anti-retaliation provision, which offers broad protection to employees who oppose discriminatory behavior and who cooperate in investigations of Title VII violations, is critical to achieving the fundamental goals of Title VII.

The business community has consistently argued to the Court that employee cooperation in internal investigations is critical to their efficacy and has repeatedly recognized the importance of protecting cooperating employees against retaliation. Accordingly, business groups encourage companies to adopt policies and practices that safeguard employees who report workplace discrimination. Nonetheless, as the present case demonstrates,

without legal protections, cooperating employees will remain vulnerable.

This Court should reverse the Sixth Circuit's opinion, which has no basis in the language of the statute and runs contrary to this Court's precedent. The Court should acknowledge what the business community itself has recognized and what the plain language of the statute dictates, and clarify that Title VII provides legal protections to employees who cooperate in internal investigations.

ARGUMENT

I. THE PLAIN LANGUAGE OF TITLE VII'S ANTI-RETALIATION PROVISION PROTECTS EMPLOYEES WHO TESTIFY IN INTERNAL INVESTIGATIONS OF POTENTIAL VIOLATIONS OF TITLE VII.

Title VII of the Civil Rights Act of 1964 provides two sources of protection for victims of retaliation by employers. Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter" (the "Opposition Clause") or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "Participation Clause"). 42 U.S.C. § 2000e-3(a) (2006). Both clauses protect employees

who testify about workplace discrimination in internal investigations.[3]

A. Testifying About Sexual Harassment in an Internal Investigation Constitutes "Oppos[ing] . . . an Unlawful Employment Practice" for Purposes of the Opposition Clause.

The Opposition Clause protects employees who "oppose" employment practices that violate Title VII. 42 U.S.C. § 2000e-3(a) (2006). As this Court has previously recognized, an exercise in statutory interpretation ends if the language is plain and unambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The clarity of the language is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Here, the language and context are self-explanatory. The word "oppose" literally means "to offer resistance to." *Webster's Third New International Dictionary* 1583 (2002). In the context of Title VII, this language encompasses any act or refusal to act that expresses opposition or resistance to a perceived Title VII violation.

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[3] Although the Participation Clause protects those who testify in internal investigations, it does not render the Opposition Clause meaningless. *Cf. EEOC v. Total Sys. Servs.*, 221 F.3d 1171, 1174 (11th Cir. 2000). While some conduct, such as that at issue here, falls under the rubric of both clauses, complaints that are made to an employer that do not relate to any "investigation, proceeding, or hearing" will only be protected by the Opposition Clause.

The record in this case is clear: During the course of an internal investigation designed to ferret out discriminatory behavior, Petitioner gave detailed testimony accusing her supervisor of conduct that constitutes blatant sexual harassment. By doing so, Petitioner clearly expressed her disapproval and her desire for such behavior to stop. She complained about the conduct and, at least theoretically, helped her employer address and eliminate discriminatory behavior from her workplace. Simply put, she acted to *oppose* her supervisor's actions within the plain meaning of the word. Accordingly, Petitioner's actions are explicitly protected by the statute.[4]

By requiring "overt opposition" and "active, consistent opposing activities" in order to qualify for protection from retaliation, the Sixth Circuit erroneously imposed additional requirements that have no basis in the language of the statute. *See Crawford v. Metro. Gov't of Nashville & Davidson County*, 211 F. App'x 373, 376 (6th Cir. 2006).[5] The

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[4] This interpretation is in line with numerous other circuit court decisions. *See, e.g.*, *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) ("Several courts, including our own, hold that assisting another employee with his . . . discrimination claim, as well as other endeavors to obtain the employer's compliance with Title VII, is protected 'opposition conduct.'"); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) ("[T]he *only* qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's [O]pposition [C]lause is that the manner of his opposition must be reasonable." (emphasis added)).

[5] The Sixth Circuit's requirement of "consistent" opposition seems particularly inappropriate in light of Title VII's goals of promoting conciliation between employers and employees. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)

Sixth Circuit's opinion also reasoned that Petitioner did not "instigate[] or initiate[] any complaint prior to her participation in the investigation, nor did she take any further action following the investigation." *Id.* These facts are irrelevant: The statutory touchstone is *opposition*, not initiation, and the fact that Petitioner did not initiate the complaint or follow up after the investigation has absolutely no bearing on whether her testimony was given *against* her supervisor's conduct. There are also no requirements in the statute as to how proactively or tenaciously an employee must oppose a Title VII violation for his or her actions to be protected.[6]

In the present case, Petitioner's testimony was made directly to her employer in a context that objectively indicates that she opposed the supervisor's behavior. Thus, Petitioner's testimony is protected activity under the plain language of the Opposition Clause.

B. An Internal Investigation of a Potential Title VII Violation Is an "Investigation, Proceeding, or Hearing Under" Title VII for Purposes of the Participation Clause.

The Participation Clause pertains to any "investigation, proceeding or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a) (2006) (emphasis added). As the Petitioner and the

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(noting "Congress' intention to promote conciliation rather than litigation in the Title VII context").

[6] The only requirement for opposition to be protected is that the manner in which it is expressed be "reasonable." *See Johnson*, 215 F.3d at 580. There is no dispute that Petitioner's conduct here was reasonable.

Solicitor General have persuasively argued,[7] Congress's use of this expansive language, as compared to the more limiting language that it used in other provisions of the statute that only apply to official EEOC proceedings or investigations, indicates that Congress intended the Participation Clause to offer broad protection that would include all investigations undertaken in connection with a potential Title VII violation.[8]

This logic has been further strengthened by the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). These decisions reshaped the legal landscape of Title VII, making employers' internal policies and practices for investigating and addressing complaints of discrimination an integral part of Title VII compliance. These cases handed employees a sword by establishing that "[a]n employer is subject to

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[7] Pet. Br. at 13-19; Brief for the United States as Amicus Curiae in Support of Petitioner's Petition for Certiorari at 10-15, *Crawford v. Metro. Gov't of Nashville & Davidson County*, No. 06-1595 (Dec. 18, 2007).

[8] Indeed, even as the Participation Clause has been interpreted by the Sixth Circuit, protection is not limited to formal investigations, proceedings or hearings conducted *by* the EEOC. Instead, internal investigations are protected if they are conducted after a complaint has been filed with the EEOC. *See Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2004). Whether an internal investigation is instigated preventively or in response to a filed EEOC complaint, it is not an official proceeding and has no formal connection to the EEOC. Therefore, the filing of an EEOC complaint should not affect whether an internal investigation is made "under" Title VII. There is nothing in the statutory language that supports such a chronological distinction.

vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. At the same time, however, these cases provided employers with a powerful shield in the form of an affirmative defense; an employer can insulate itself against vicarious liability by demonstrating (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Neither case explicitly requires employers to implement an internal complaint processing and investigation procedure. Both clearly indicate, however, that the Court expected internal investigations to occupy a central role under Title VII. Under the holdings, "the need for a stated policy suitable to the employment circumstances may appropriately be addressed . . . when litigating the first element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. *Faragher* goes further, strongly suggesting that large employers will not be able to establish the first element of the affirmative defense unless they promulgate formal anti-harassment policies and well-designed complaint procedures.[9] Both cases also state that

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[9] *Faragher*, 524 U.S. at 808-09 ("Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have

demonstrating an employee's unreasonable failure to use an employer's complaint procedure "will normally suffice to satisfy the employer's burden under the second element of the offense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

Viewed in combination, these holdings establish that an employer may only avoid "automatic" vicarious liability, *see Faragher*, 524 U.S. at 804; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), if it can prove that it acted reasonably to prevent and correct harassment *and* that the employee unreasonably failed to utilize any corrective mechanisms that the employer provided. Therefore, it is difficult, if not impossible, for large employers (such as city governments) to avoid vicarious liability if they do not establish formal internal procedures, and an employee who unreasonably fails to take advantage of an employer's reasonable internal complaint procedure will not be able to recover against the employer.

This system of incentives inextricably binds employers' formal internal investigations to the operation of Title VII. With the possible exception of small employers, liability under Title VII can turn on the existence and implementation of reasonable processes for handling complaints internally. Employees are compelled to participate in these internal proceedings because their right to recover under Title VII is generally contingent on such participation. This incentive structure also ensures

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thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.").

that Title VII cases generally will only be brought against employers after the employers' internal grievance procedures have run their course. Thus, the reasonableness of the structure and administration of a company's internal processes can be a central issue in Title VII litigation.

Thus, under *Faragher* and *Ellerth*, the presence or absence of an appropriate internal investigation process and the details of its design and administration can determine whether a company is liable for discrimination under Title VII. These internal investigations are clearly contemplated by Title VII and are integral to its operation. Accordingly, such proceedings are investigations, proceedings or hearings "under" Title VII within the meaning of the statute. 42 U.S.C. § 2000e-3(a) (2006).[10]

Employers have overwhelmingly responded to the legal framework set forth in *Faragher* and *Ellerth* by establishing internal procedures for reporting and investigating complaints of harassment.[11] Thus, internal complaint procedures

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[10] The Court's subsequent decisions further bolster this conclusion. In *Kolstad*, the Court held that a plaintiff under Title VII cannot recover punitive damages against an employer who engages in good faith efforts to comply with Title VII (presumably by establishing reasonable internal complaint, investigation, and remediation processes) on the basis of the actions of the employer's managerial agents. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). The Court has also noted that fostering effective employer grievance procedures advances Congress's purpose of amicably resolving Title VII controversies. *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004).

[11] See discussion in Part III.B, *infra*.

and investigations play as significant a role in the resolution of complaints under Title VII *in practice* as they do under Title VII's formal legal framework. In light of their prominent role in both the theoretical framework of Title VII and the practical application of its provisions, internal investigations are properly characterized as investigations under Title VII and, therefore, logically fall into the domain of the Participation Clause.

II. CONSTRUING TITLE VII'S ANTI-RETALIATION PROVISION TO PROTECT EMPLOYEES' INVOLVEMENT IN INTERNAL INVESTIGATIONS FURTHERS TITLE VII'S PURPOSE AND IS CONSISTENT WITH THE COURT'S PRECEDENT.

A. A Primary Purpose of Title VII Is to Encourage Employers to Learn of Unlawful Behavior and Take Corrective Action.

Although Title VII was intended, in part, to make victims of discrimination whole, its primary purpose was to prevent and eradicate discrimination in the workplace.[12] Congress determined that the

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[12] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (acknowledging that Title VII's primary aim is "not to provide redress but to avoid harm"); *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2412 (2006) ("The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (stating that Title VII's "central statutory purposes [are to] eradicate[e] discrimination throughout the economy and mak[e] persons whole for injuries

best and most effective way to accomplish this was for employers to develop their own internal processes to prevent and correct discrimination; Title VII was created in the hope that it would prompt employers to engage in voluntary efforts to eradicate workplace discrimination.[13]

The Court has repeatedly recognized that direct, "smoking gun" evidence of discrimination can be very difficult to uncover.[14] Claims of unlawful

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suffered through past discrimination"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (finding that the purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

[13] *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975))); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("[W]hen it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act."); *United Steelworkers v. Weber*, 443 U.S. 193, 204-06 (1979) ("'There is reason to believe . . . that national leadership provided by the enactment of Federal legislation . . . will create an atmosphere conducive to voluntary or local resolution of . . . discrimination.'" (emphasis omitted) (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963))).

[14] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (recognizing that "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors"); *U.S.*

discrimination often come down to one person's word against another's, which means that corroborating evidence from witnesses or other victims is vitally important to an employer seeking to determine the merit of a complaint. Thus, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses" when discrimination occurs. *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2414. Title VII's anti-retaliation provisions exist to safeguard employees "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at 2412.

Without witnesses' cooperation, employers will have difficulty conducting internal investigations, accurately evaluating their employment practices, and eliminating discrimination from the workplace. Indeed, this would render internal investigations hollow exercises.[15] Moreover, if victims fear that witnesses will be unwilling to provide corroborating evidence, they will be less likely to come forward and make complaints, further hampering an employer's ability to ferret out unlawful workplace

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Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

[15] Under the Sixth Circuit's standard, employees who are asked to participate in their employer's internal investigation will be understandably hesitant and may even refuse to cooperate for fear that they may be fired or otherwise retaliated against. The Sixth Circuit's decision thus undermines the very purpose for which Congress enacted Title VII.

discrimination.[16] Simply put, employers' anti-discrimination policies and procedures for investigating claims of discrimination would be meaningless if employees who participated in them were subject to retaliation.

Thus, the purpose of Title VII's anti-retaliation provision "reinforces what language already indicates"—the provision applies to employees who provide incriminating testimony in internal investigations in order to "help[] assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2412, 2414.

B. This Court Has Consistently Interpreted the Anti-Retaliation and Other Provisions of Title VII Broadly to Further the Statute's Purposes.

To effectuate Congress's vision of Title VII, the Court has consistently interpreted it as providing employers with incentives to create internal policies that assist them in detecting and deterring workplace discrimination. For example, in *Faragher* and *Ellerth*, it looked to the statute's purpose to conclude that Title VII provides an affirmative defense to employers who make significant and good faith efforts to comply with Title VII.[17] In *Kolstad*,

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[16] *See* Brief for the National Women's Law Center et al. Supporting Petitioner, *Crawford v. Metro. Gov't of Nashville & Davidson County*, No. 06-1595 (Apr. 16, 2008).

[17] *See Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms."); *Faragher*, 524 U.S. at 806 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to

the Court reinforced employers' incentives to self-police by holding that employers who engage in good faith efforts to comply with Title VII are not subject to punitive damages. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) (acknowledging "Title VII's objective of motivat[ing] employers to detect and deter Title VII violations").

This Court has also consistently construed Title VII's anti-retaliation provision broadly to comport with Congress's intent. For example, in *Robinson*, the Court held that Title VII's anti-retaliation provision protects former employees from retaliation, even though the language of the statute refers only to "employees." *See* 519 U.S. at 346. The Court's inclusive reading of the statute was supported by the well-established purposes of Title VII. *See id.* ("Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions . . . . The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII . . . .").

Similarly, in *Burlington Northern*, the Court ruled that Title VII's anti-retaliation provision prohibits retaliation that takes place outside of the workplace, thereby extending the reach of Title VII's anti-retaliation provision to prohibit conduct outside the scope of the statute's substantive anti-discrimination provisions. 126 S. Ct. at 2414.

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recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.").

Again, the Court extended broad protection in light of the objectives of Title VII. *See id.* at 2412 ("[A] limited construction would fail to fully achieve the anti-retaliation provision's 'primary purpose' . . . .").[18]

This Court's jurisprudence compels an interpretation of Title VII that complies with the statute's expansive goals.[19] A decision confirming that Title VII protects cooperating employees from retaliation, even in the absence of a pending EEOC charge, is not only consistent with the statute's text, but is also essential to ensure the efficacy of internal complaint procedures and, therefore, to the preventive goals of Title VII.

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[18] Circuit courts have generally taken an equally expansive approach to interpreting Title VII. *See, e.g.*, *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (holding that a reasonableness test for protection of testimony under the Participation Clause would contradict the text of the statute and the objectives of Title VII); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) (holding that opposition by a representative of a plaintiff can qualify as protected activity under the anti-retaliation provision); *Evans v. City of Houston*, 246 F.3d 344, 353 n.7 (5th Cir. 2001) (stating that internal grievance hearing regarding discrimination claims was protected activity under the Participation Clause).

[19] *See Kolstad*, 527 U.S. at 545 ("[W]e are compelled to . . . avoid undermining the objectives underlying Title VII.").

III. PROTECTING EMPLOYEES WHO TESTIFY ABOUT DISCRIMINATION IN INTERNAL PROCEEDINGS WILL NOT BURDEN EMPLOYERS BECAUSE THE BUSINESS COMMUNITY ALREADY ADVOCATES PROVIDING SUCH PROTECTIONS.[20]

A. The Business Community Has Repeatedly Touted the Importance of Witness Cooperation to the Efficacy of Internal Investigations.

The Business Community has consistently stressed to the Court the importance of meaningful internal investigations to fulfilling Title VII's preventive purpose, and has urged the Court to

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[20] The term "Business Community" is used in this Part to describe organizations that purport to represent the business community, including, but not limited to: (1) the Chamber of Commerce, which "represents the interests of over 160,000 corporations, partnerships, and proprietorships as well as several thousand state and local chambers and professional associations"; (2) the Equal Employment Advisory Council, whose membership "includes over 330 of the nation's largest private sector corporations which collectively employ more than 20 million people throughout the United States"; and (3) the Society of Human Resource Management, which "provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 175,000 professional and student members worldwide." *See* Brief for the Chamber of Commerce as Amicus Curiae Supporting Respondent at ii, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (No. 98-208); Brief for the Equal Employment Advisory Council as Amicus Curiae Supporting Petitioner at 2, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95); Brief for the Society of Human Resource Management as Amicus Curiae Supporting Petitioner at 2, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95).

adopt legal rules that encourage victim and witness cooperation. Employers argue that they must rely on employees to report unlawful behavior because "[e]ven the most conscientious employer cannot know or control every day-to-day action of every employee and must know of the harassing behavior before it can take action to halt it."[21]

Since the efficacy of employers' internal complaint procedures depends on the willingness of employees to report discrimination and harassment and serve as witnesses in internal investigations, the Business Community has consistently emphasized the necessity of encouraging victims and witnesses to come forward. According to the Chamber of Commerce, a "reasonable employer" will "encourage employees to report sexual harassment."[22] The EEAC agrees that "a good procedure encourages employees to report incidents of harassment . . . . Without the victim's cooperation, even the finest anti-harassment procedure is ineffective."[23] Employers also recognize that facilitating other employees' participation in internal investigations is essential. According to the Business Community, in the wake of *Faragher* and *Ellerth*, "companies have implemented formal antiharassment procedures that

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[21] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 23, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

[22] *See* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioner at 25, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

[23] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 23, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

encourage witnesses as well as victims to report sexual harassment to management."[24]

As the Business Community has acknowledged, however, "it often is difficult to persuade employees to come forward with reports of suspected wrongdoing or participate in investigations of workplace misconduct."[25] The Business Community has emphasized that affording protection to victims and cooperating witnesses is essential to encouraging their participation, and has warned of the negative consequences that will ensue if witnesses and victims are not protected: "If already reluctant employees knew that by reporting alleged wrongdoing they would potentially be exposing themselves to an investigation into their own motives, they would be even less likely to step forward."[26] But perhaps the Business Community most clearly articulated the consequences of leaving cooperating employees vulnerable to retaliation when it warned that:

> As a practical matter, a rule that effectively discourages individuals from reporting suspected wrongdoing would result in employers learning about far fewer problems at work, and thus having less of an opportunity to correct those problems and prevent future

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[24] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 20, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95).

[25] Brief for the Equal Employment Advisory Council as Amicus Curiae at 16, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, No. 06-341 (Feb. 20, 2007).

[26] *Id.*

> occurrences. Not only would such a result be at odds with the aims and objectives of Title VII, it would lead ultimately to less productive and emotionally healthy workplaces.[27]

As the Business Community has observed, "[t]his Court has determined that 'dissuading employers from implementing programs or policies [that] prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.'"[28] Reading Title VII as exposing employees to reprisals for their cooperation with internal investigations would do precisely that: It would discourage employees from coming forward to report Title VII violations and render worthless the very internal complaint procedures adopted to uncover and address workplace discrimination. The Court should heed the warnings of the Business Community and confirm that Title VII prohibits retaliation against employees who participate in internal investigations.

B. The Business Community Already Advises Employers to Adopt Policies Prohibiting Retaliation Against Employees Who Cooperate in Internal Investigations.

The Business Community, through its publications and sample policies, already advises

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[27] *Id.* at 16-18.

[28] Brief Amicus Curiae of the Society of Human Resource Management in Support of the Petitioner at 22, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999)).

employers to protect victims and witnesses from retaliation based on their cooperation with internal investigations. Notably, the Business Community has not made any distinction between investigations conducted before charges have been filed with the EEOC and those that take place afterward. Instead, it has counseled employers to prohibit retaliation against cooperating employees in *all* investigations, not only in those that are conducted after EEOC charges have been filed.

For example, a sample sexual harassment policy available on the Chamber of Commerce website includes a provision entitled "Retaliation Prohibited," which states that the employer "will permit no employment-based retaliation against anyone who brings a complaint of sexual harassment or speaks as a witness in the investigation of a complaint of sexual harassment."[29] The Chamber also acknowledges that "[w]hen an employee actually gets the nerve to report harassment, they are usually already apprehensive and scared because of the hostile treatment they may have received."[30] As a result, the Chamber recommends that employers "include a clause indicating that employees will not be penalized or reprimanded for reporting harassment."[31] According to the Chamber, incorporating such provisions into an anti-harassment policy will not only help employees, but

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[29] Sexual Harassment Aids: Sample Sexual Harassment Policy #2, http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (last visited Apr. 3, 2008) (emphasis added).

[30] Creating a Harassment Policy, http://www.uschamber.com/sb/business/P05/P05_5185.asp (last visited Apr. 3, 2008).

[31] *Id.*

"may actually get them to report harassment before it gets worse or more dangerous."[32] Once an investigation has begun, the Chamber's Harassment Investigation Guide recommends that employers "[a]ssure all witnesses that their cooperation is important, that their testimony is confidential *and that they will not be retaliated against for testifying*."[33]

Similarly, business publications already advise employers that victims and witnesses who cooperate with internal investigations must be protected from retaliation. *See, e.g.*, Daryll J. Neuser, *How to Conduct Effective Internal Investigations of Workplace Matters*, Emp. Rel. L.J., Summer 2005, at 82 ("Reassure the witness that the company prohibits retaliation for participating in an internal investigation."); Jonathan A. Segal, *HR as Judge, Jury, Prosecutor and Defender*, HR Mag., Oct. 2001, at 6 ("Employees generally cannot be retaliated against for making a complaint in good faith or for serving as a witness in good faith—even if the complaint lacks merit."); Amy Maingault et al., *Insubordination, Adoption Leave, Confidentiality*, HR Mag., Apr. 2007, at 2 (explaining that witnesses "should be assured that adverse employment actions will not result from their cooperation").

Thus, the Business Community has made clear that a sound discrimination policy will protect all employees who cooperate with an internal investigation from retaliation, regardless of the

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[32] *Id.*

[33] Sexual Harassment Aids: Harassment Investigation Guide, http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (last visited Apr. 3, 2008) (emphasis added).

context in which the investigation is undertaken. Establishing that such protections are legally mandated therefore presents little risk of imposing a burden on employers.

C. Clarification of the Legal Standard Is Necessary to Protect Employees and Avoid Overwhelming the Courts.

The Business Community asserts that its concerted efforts to promote formal anti-discrimination policies and complaint procedures have borne fruit.[34] The significant growth in employers' use of anti-discrimination training, policies and procedures (including internal investigation processes) certainly suggests that the Court's rulings construing Title VII have spurred some of the self-assessment and detection that Congress intended.

Yet the proliferation of internal policies against retaliation does not mean that employees do not need legal protections against retaliation. An employer's general policy against retaliation does not prevent the employer from making exceptions to the

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[34] *See, e.g.*, Brief for the Equal Employment Advisory Council as Amicus Curiae Supporting Petitioner at 3, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569) ("EEAC's members have implemented formal anti-harassment procedures that encourage witnesses as well as victims to report sexual harassment to management."); Brief of the Society of Human Resource Management and the National Federation of Independent Business Legal Foundation as Amici Curiae in Support of the Petitioner at 2-3, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259) (stating that both organizations provide suggested procedures and other guidance to their over 800,000 combined members for redressing discrimination and retaliation).

rule when it is in the employer's interest. Indeed, the record indicates that this is precisely what happened here: Petitioner and the other women who reported sexually harassing conduct expressed their reluctance to participate in the internal investigation for fear of retaliation. Pet. Br. at 4. In response, at least one of the women was assured by the investigators that she would not be fired for her participation. *Id.* at 4. Despite this assurance, she was fired within minutes of receiving the investigation's completed report, as were the other women who participated. *Id.* at 4-5. The Business Community's articulations of best practices do not create legal protections for employees and therefore offer little solace to employees who fear retaliation. Without a decision confirming that Title VII mandates such protections, employees will remain vulnerable to reprisals.

Moreover, a decision holding that Title VII does *not* protect cooperating employees absent a pending EEOC charge would place a significant burden on employers, the EEOC, and the courts. In order to safeguard employees from retaliation, prudent counsel would advise all employees to file an EEOC charge before cooperating with any internal investigation. As a result, employers' internal investigations would stall or be rendered ineffective, and the EEOC would be inundated with charges. Employers would be forced to evaluate these charges, and courts would ultimately be left to sort out the mess. Thus, such a ruling would not only run counter to Title VII's text and purpose, but would also undermine *Faragher* and *Ellerth* by making voluntary compliance with Title VII increasingly complicated and costly.

The Court should not impose this burden on employees, employers, the EEOC, or the courts. Instead, the Court should heed the previous statements of the Business Community and confirm that Title VII's anti-retaliation provision protects employees who cooperate with internal investigations.

CONCLUSION

For the foregoing reasons, this Court should rule that Title VII prohibits retaliation against employees who provide information in an employer's internal investigation that occurs prior to the filing of an EEOC charge. The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX

LEADERSHIP CONFERENCE ON CIVIL RIGHTS (LCCR) PARTICIPATING ORGANIZATIONS, 2007-2008

A. Philip Randolph Institute
AARP
ACORN
ADA Watch
Advancement Project
African Methodist Episcopal Church
Alaska Federation of Natives
Alaska Inter-Tribal Council
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American-Arab Anti-Discrimination Committee
American Association for Affirmative Action
American Association of People with Disabilities
American Association of University Women
American Baptist Churches, U.S.A.-National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor- Congress of Industrial Organizations
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Jewish Committee
American Jewish Congress

American Nurses Association
American Postal Workers Union, AFL-CIO
American Society for Public Administration
American Speech-Language-Hearing Association
Americans for Democratic Action
Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Associated Actors and Artistes of America, AFL-CIO
Association for Education and Rehabilitation of the Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFLCIO
Catholic Charities, USA
Center for Community Change
Center for Responsible Lending
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Citizens' Commission on Civil Rights
Coalition of Black Trade Unionists
Common Cause
Communications Workers of America
Community Action Partnership
Community Transportation Association of America
DC Vote
Delta Sigma Theta Sorority
Disability Rights Education and Defense Fund

Division of Homeland Ministries-Christian Church (Disciples of Christ)
Epilepsy Foundation of America
Episcopal Church-Public Affairs Office
Evangelical Lutheran Church in America
FairVote: The Center for Voting and Democracy
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Global Rights: Partners for Justice
GMP International Union
Hadassah, The Women's Zionist Organization of America
Hotel and Restaurant Employees and Bartenders International Union
Human Rights Campaign
Human Rights First
Improved Benevolent & Protective Order of Elks of the World
International Association of Machinists and Aerospace Workers
International Association of Official Human Rights Agencies
International Brotherhood of Teamsters
International Union, United Automobile Workers of America
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Community Centers Association
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Laborers' International Union of North America
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
League of Women Voters of the United States
Legal Momentum
Mashantucket Pequot Tribal Nation
Matthew Shepard Foundation
Mexican American Legal Defense and Education Fund
Na'Amat USA
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal & Federal Employees
National Association for Equal Opportunity in Higher Education
National Association for the Advancement of Colored People (NAACP)
National Association of Colored Women's Clubs, Inc.
National Association of Community Health Centers
National Association of Human Rights Workers
National Association of Negro Business & Professional Women's Clubs, Inc.
National Association of Neighborhoods
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Bar Association
National Black Caucus of State Legislators
National Catholic Conference for Interracial Justice
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.
National Congress for Community Economic Development
National Congress for Puerto Rican Rights
National Congress of American Indians
National Council of Catholic Women
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance
National Farmers Union
National Federation of Filipino American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Institute For Employment Equity
National Korean American Service and Education Consortium, Inc. (NAKASEC)
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Organization for Women
National Partnership for Women & Families
National Puerto Rican Coalition
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild

Office of Communications of the United Church of Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
OCA (formerly known as Organization of Chinese Americans)
Paralyzed Veterans of America
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Equality, Inc.
Puerto Rican Legal Defense and Education Fund, Inc.
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
Secular Coalition for America
Service Employees International Union
Servicemembers Legal Defense Network
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The Justice Project
The National Conference for Community and Justice
The National PTA

Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO
United Brotherhood of Carpenters and Joiners of America
United Church of Christ-Justice and Witness Ministries
United Farm Workers of America, AFL-CIO
United Food and Commercial Workers International Union
United Methodist Church-General Board of Church & Society
United Mine Workers of America
United States Conference of Catholic Bishops
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Women's American ORT
Women's International League for Peace and Freedom
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA of the USA, National Board
Zeta Phi Beta Sorority, Inc.